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No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARICOPA COUNTY, ARIZONA, ET AL., PETITIONERS

v.

THE VALLEY NATIONAL BANK OF PHOENIX, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AMICUS CURIAE

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OPINION BELOW

The District Court made findings of fact and conclusions of law (R. 202–263, 270–330) but wrote no opinion. The opinion of the Circuit Court of Appeals (R. 381–387) is reported in 130 F. (2d) 356.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 7, 1942 (R. 388). The petition for certiorari was filed on October 8,

1942, and granted on November 16, 1942. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Act of March 20, 1936, is unconstitutional under either the Fifth or Tenth Amendments, in that it exempts the Reconstruction Finance Corporation from the impact of local taxes which had already been assessed but not collected, where such local taxes had been levied pursuant to permission previously granted by Congress.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

ARTICLE I, Section 8.

The Congress shall have Power * * *

* * * * * *

Cl. 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * * *

AMENDMENT V:

* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Revised Statutes as amended:

SEC. 5219. The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, * * *. (U. S. C., Title 12, Sec. 548.)

Reconstruction Finance Corporation Act, c. 8, 47 Stat. 5:

SEC. 10. * * * The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. (U. S. C., Title 15, Sec. 610.)

Act of March 20, 1936, c. 160, 49 Stat. 1185:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sec-

tion 304 of the Act entitled "An Act to provide relief in the existing national emergency in banking and for other purposes", approved March 9, 1933, as amended, be further amended by adding at the end thereof the following:

"Notwithstanding any other provision of law or any privilege or consent to tax expressly or impliedly granted thereby, the shares of preferred stock of national banking associations, and the shares of preferred stock, capital notes, and debentures of State banks and trust companies, heretofore or hereafter acquired by Reconstruction Finance Corporation, and the dividends or interest derived therefrom by the Reconstruction Finance Corporation, shall not, so long as Reconstruction Finance Corporation shall continue to own the same, be subject to any taxation by the United States, by any Territory, dependency, or possession thereof, or the District of Columbia, or by any State, county, municipality, or local taxing authority, whether now, heretofore, or hereafter imposed, levied, or assessed, and whether for a past, present, or future taxing period." (U. S. C., Title 12, Sec. 51d.)

* * * * *

Arizona Code, 1939:

SEC. 73-204. *Assessment of property and shares of stock in corporations—Banking * * * and finance corporations.* The property of corporations shall be as-

sessed and taxed and no assessment shall be made of the shares of stock of corporations, nor shall any holder thereof be taxed for such shares. The foregoing provision shall not apply to a banking corporation, * * * the shares of stock of which shall be assessed and taxed as other property, in the name of the shareholders of the several shares thereof, to be entered and taxed in the name of, and be payable by, such corporation or association.

SEC. 73-205. *Statement to assessor by banking corporation and shareholders—Tax payable by corporation.* * * * The taxes due thereon shall be paid by such corporation or association, and shall be a lien against and assessed to such shares of stock, and no such corporation or association shall pay any dividends to any shareholder who is in default in the payment of taxes due on his shares, nor shall it permit the transfer on its books of any shares the owner of which is in default in the payment of his taxes on the same.

SEC. 73-506. *Lien for taxes—Liability of property—Homestead exempt.* Every tax levied under the authority of this chapter upon real or personal property shall be a lien upon the property assessed. The lien shall attach on the first Monday in January in each year, * * *

STATEMENT

Under Section 5219 of the Revised Statutes Congress consented, on certain conditions, to state

and local taxation of shares of stock in national banking associations. Until March 9, 1933, national banks had no power to issue preferred shares. By statute then enacted national banks were authorized to issue preferred stock and the Reconstruction Finance Corporation (referred to herein as the R. F. C.) was authorized to subscribe therefor. Act of March 9, 1933, c. 1, 48 Stat. 1, Title III, amended by Section 2 of the Act of March 24, 1933, c. 8, 48 Stat. 20. Under Section 10 of the Reconstruction Finance Corporation Act, it had been provided that "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation * * * except that any real property of the corporation shall be subject to * * * taxation * * *." On acquisition by the R. F. C. of preferred stock in national banks the question arose whether such preferred stock was subject to state and local taxation under the consent earlier given by Congress in Section 5219 of the Revised Statutes.

Under the Arizona statutes shares of stock in banking corporations are taxed. The tax is paid in the first instance by the bank, but it is entitled to reimbursement from the stockholder on whom the tax liability ultimately rests. Arizona Code, 1939, Secs. 73-204, 73-205. *Peoples Finance & Thrift Co.* v. *Pima Co.*, 44 Ariz. 440, 444, 449. The Arizona statutes further provide that a lien

for all taxes levied shall attach as of the first Monday in January of each year. Section 73–506. Assessments of personal property are made by the county assessor between the first Monday in January and the first Monday of May of each year. Section 73–406. State and local taxes levied on the basis of this assessment are collected by the county treasurer as *ex officio* tax collector. Sections 73–605, 73–702.

The instant controversy involves two suits, No. 333 and No. 350, for injunctions against the collection of state and local taxes for the years 1935 and 1936, respectively, levied against national bank preferred stock owned by the R. F. C. The two cases were consolidated for trial and appeal (R. 188). The facts as found by the District Court may be briefly summarized as follows:

On February 11, 1935, the Valley National Bank of Phoenix (referred to herein as the bank) began to operate as a national banking association in several Arizona counties, including Maricopa and Pima Counties (R. 209). On that day it issued to the R. F. C. some 198,400 shares of preferred stock with a par value of $1,240,000 (R. 214–215). Thereafter in accordance with the requirements of Arizona law the bank furnished the counties' assessors with the names of its stockholders and the amounts of stock held by

each. Included was the preferred stock owned by the R. F. C. (R. 212, 215).

The county assessor for Maricopa County, for the tax year 1935, assessed the value of the bank's stock allocable to that county as $793,595.08. Of this sum $507,501 was the valuation placed on Maricopa County's proportion of the shares of preferred stock of the bank owned and held by the R. F. C. (R. 219–220). For the same tax year the assessment of the Pima County assessor against the bank was $327,590 and of this assessment only $139,088.80 was properly allocable to the bank's common stock. The difference, some $188,501.20, was assessed on account of valuations represented by the bank's preferred stock owned and held by the R. F. C. (R. 223).

After these assessments had been made the bank prosecuted timely appeals to the county boards of equalization and to the State Board of Equalization without securing any relief respecting the assessment of its preferred stock (R. 232–233). Thereafter the state, county, and other local tax bodies determined their respective tax rates necessary for the year. The county boards of supervisors then levied taxes against the bank in the sum of $49,810.86 for Maricopa County and $20,362.92 for Pima County, respectively (R. 234–235). The county treasurers acting as agents for the state, county, and other local bodies were required to collect one-half of this sum on or before

the first Monday in November 1935, and the other half in May 1936 (R. 235). Before November 4, 1935, the bank filed its original bill of complaint in the federal District Court for the District of Arizona in suit No. 333, praying for an injunction against collection of that portion of the 1935 taxes levied against its preferred stock owned by the R. F. C. on the ground that the Constitution and laws of the United States exempted such stock from the threatened tax. Reliance was placed as well on Section 2 of Article IX of the Arizona Constitution exempting federal property from taxation (R. 243–255).[1] Under a stipulation between parties whereby the portion of the tax concededly due on the bank's common stock was paid the case remained in abeyance on the District Court Docket until April 9, 1939 (R. 243–244).

During the pendency of this action this Court handed down its decision in *Baltimore Nat. Bank* v. *State Tax Comm'n*, 297 U. S. 209, holding that

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[1] Petitioner, Pima County, and its county officers moved this Court for leave to file a petition for a writ of mandamus to the judge of the federal District Court for the District of Arizona to compel the convening of a three-judge court pursuant to Section 266 of the Judicial Code. This Court denied the motion, *Ex Parte Bransford*, 310 U. S. 354, and stated at p. 358:

> If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act. * * *

preferred national bank stock held by the R. F. C. was subject to state taxation by virtue of the consent given by Congress in Section 5219 of the Revised Statutes. The decision was rendered on February 3, 1936. On March 20, 1936, Congress enacted the statute, set out above, exempting shares of preferred bank stock owned by the R. F. C. from taxes "whether now, heretofore, or hereafter imposed, levied, or assessed, and whether for a past, present, or future taxing period."

In its final disposition of suit No. 333 the District Court ruled that at the time the complaint was filed the bank's remedy at law with respect to the taxes in question was inadequate. Accordingly and on the authority of the Act of March 20, 1936, a permanent injunction was issued against collection of that portion of the 1935 tax levied on the bank's preferred stock owned by the R. F. C.

Suit No. 350 involves taxes for the year 1936 (R. 267–269). Maricopa and Pima Counties again included substantial assessments against the bank's preferred stock owned by the R. F. C. (R. 301). Taxes thereon were levied after August 5, 1936 (R. 296–303, 325). Before these taxes became payable on November 2, 1936, the bank instituted this action to enjoin collection of that portion of the tax based on an assessment of the preferred stock. As in the consolidated suit involving 1935 taxes a permanent injunction against

collection of this portion of the tax was granted (R. 267–269, 331–333).

From the adverse judgments in the two suits Maricopa and Pima and their respective tax officials appealed (R. 334–338). As ground for reversal the appellants relied entirely on the asserted unconstitutionality under the Fifth and Tenth Amendments of the Constitution of application of the Act of March 20, 1936, to the 1935 and 1936 taxes (R. 346–357). The Circuit Court of Appeals held that the Act of March 20, 1936, by its terms applied to the taxes involved and that as so applied it was constitutional. The judgment of the District Court was affirmed (R. 381–388). This Court granted certiorari.

Pursuant to the Act of August 24, 1937, the case was certified to the Attorney General as involving the constitutionality of the Act of March 20, 1936. In response to that certification the United States submits this brief as *amicus curiae*.

SUMMARY OF ARGUMENT

I

A. Although petitioner-counties may properly assert the State's claim to protection under the Fifth Amendment in this suit, that amendment does not extend to the claims here asserted against the Federal Government by states or their political subdivisions. This is clear by reference to the genesis and history of the due process clause which is a direct inheritance from Magna Charta.

The protection there given was to "freemen" against oppressive acts of the Crown. In this tradition of protecting the rights of individuals, the Fifth Amendment was written into the Constitution. It was designed to protect the liberty and property of individuals from oppressive acts of the Federal Government. Wholly apart from the controverted question whether the due process clause was intended to protect corporate rights, it certainly was never designed to regulate the distribution of political power between the national government and the states.

B. In any event even if petitioners in asserting their present claim are properly within the protection of the Fifth Amendment, the Act of March 20, 1936, is valid. The power of Congress to immunize the property of federal agencies from state and local taxation extends to the property of the R. F. C. Unless there is some element of surprise and inequity in the Act its retrospective application is consistent with due process. In fact the counties at all times have been aware that the R. F. C. claimed immunity for the stock in question. Moreover, there was substantial basis for this claim. Thus when the 1935 taxes were levied thereon the counties were charged with knowledge of their doubtful validity. The Act of March 20, 1936, exempting from such taxation therefore involved no element of surprise. It was, rather, a curative statute designed to correct an inadvertent

legislative oversight. Enacted under circumstances giving rise to no substantial equities in the counties it is valid as applied to the 1935 taxes under prior decisions of this Court.

The 1936 taxes were levied after March 20, 1936, hence the Act applies prospectively with respect thereto. The prospective feature of the Act is clearly valid and separable from the retrospective feature.

II

The Act of March 20, 1936, invades no powers reserved to the states by the Tenth Amendment. The power to authorize or prohibit state taxation of securities held by the R. F. C. is vested exclusively in Congress by Article I, Section 8, of the Constitution. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21. Hence, the power to tax the stock of national banks, and more particularly such stock owned by the R. F. C., was not constitutionally reserved to the states. The decisions of this Court make clear that the state can tax such stock only by virtue of Congressional consent. Retrospective withdrawal of that consent which is also within the power of Congress under Article I, Section 8, therefore, invades no powers reserved to the states by the Tenth Amendment.

ARGUMENT

INTRODUCTION

The Reconstruction Finance Corporation was created by Congress "to give relief to financial

and kindred institutions in a national emergency." Serving as a lending agency of the Federal Government, it sought to make available to banks and other financial institutions capital funds at the lowest appropriate rates. In all its functions "the purpose that it has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as the result of the great depression." *Baltimore Nat. Bank* v. *State Tax Comm'n*, 297 U. S. 209, 211. In 1933 the Corporation was authorized to furnish needed capital to certain types of banks by the outright purchase of preferred stock as well as by loans of various sorts.[2] In keeping with the purpose of its existence, it was authorized to act only when the need of banks for capital funds made its intervention necessary to safeguard and strengthen the banking system.[3] And, as in the case of its larger lending activities, its objective in purchasing preferred stock was exclusively to assist the banks. Thus, for example, it has from time to time consented to a reduction in dividend rates on the stock which it holds in order to accomplish

[2] Act of March 9, 1933, c. 1, 48 Stat. 1, 6, Title III, amended by Section 2, Act of March 24, 1933, c. 8, 48 Stat. 20.

[3] Id.

its purpose more effectively with a minimum burden on the banks.[1] Its origins, and the objects and characteristics of its operations, stamp the Corporation as an instrumentality of the United States performing governmental functions in substantially the same manner as other corporate arms of the Federal Government. Cf. *Baltimore Nat. Bank* v. *State Tax Comm'n*, 297 U. S. 209; *Langer* v. *United States*, 76 F. (2d) 817 (C. C. A. 8); and compare *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95; *New Brunswick* v. *United States*, 276 U. S. 547; *Clallam County* v. *United States*, 263 U. S. 341.

As an instrumentality of the United States the Corporation stands on a parity with other branches of the Government and shares in their constitutional immunity from state taxation. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421–422, 432; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158–159; *South Carolina* v. *United States*, 199 U. S. 437, 451–452; *New Brunswick* v. *United States*, *supra*; *Clallam County* v. *United States*, *supra*; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481. Whatever question there may be as to the Corporation's immunity from such taxation with respect to its holdings of securities in the absence

[1] Hearings on H. R. 11047 before House Committee on Banking and Currency, 74th Cong., 2d Sess., p. 7.

of any congressional expression on the matter,[5] it is clear that the Constitution vests in Congress the authority so to protect the Corporation if it chooses. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95. And in accordance with its authority in this respect, Congress explicitly forbade state taxation of "the corporation, including its franchise, * * * capital, reserves, and surplus, and its income" (Section 10, Reconstruction Finance Corporation Act, *supra*, p. 3).

Although the tax here involved is formally collected from the bank, in fact, and in legal contemplation, the exaction is imposed on the holder

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[5] Cf. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477. Although it is not necessary in this case to explore the boundaries of the constitutional immunity, it should be noted that the state tax here does more than merely "impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions" (p. 481). In furtherance of its purpose the Reconstruction Finance Corporation has kept its charges for making capital funds available at the lowest rate consistent with sound financing, thus leaving for itself a very small margin to cover operating expenses and individual losses. "Taxation of the preferred shares * * * of banks held by the Reconstruction Finance Corporation will not only encroach in all cases upon the small margin between the cost to the Reconstruction Finance Corporation of its money and the return on its investment in banks, but in many cases it will wipe this margin out entirely, impeding the Corporation's operations and leaving it perhaps with an actual substantial loss" (H. Rept. No. 1995, 74th Cong., 2d Sess., p. 2; S. Rept. No. 1545, 74th Cong., 2d Sess). Accordingly, taxes of the sort here involved interfere substantially with the

of its stock, in this case the R. F. C. By Revised Statutes, Section 5219, Congress explicitly delegated to the states the authority to tax shares of national bank stock in the hands of their holders. There is no need to decide here whether, in the absence of that authorization, the shares would have been taxable in the hands of any private holders. Cf. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *Bank of California* v. *Richardson*, 248 U. S. 476; *First National Bank* v. *Adams*, 258 U. S. 362; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103. It suffices that, as a result of that authorization, state taxation of these shares in the hands of the Reconstruction Finance Corporation was upheld, *Baltimore Nat. Bank* v. *Tax Comm'n, supra*, and the supervening immunity which the Reconstruction Finance Corporation was given by Section 10 of its Act was rendered ineffective to protect the Corporation from taxes on its holdings of national bank stock. Since Congress could have constitutionally prohibited state taxation of the shares held by the R. F. C. (cf. *Pittman* v. *Home Owners' Loan Corp., supra; Federal Land Bank* v. *Bismarck Lumber Co., supra*), it is clear that to the extent

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R. F. C.'s functions. If the immunity exists at all in the absence of an explicit congressional declaration, the circumstances of this case would call it into play. Compare *Clallam County* v. *United States, supra; New Brunswick* v. *United States, supra*, and cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

that Revised Statutes, Section 5219, authorized such taxation, political power was gratuitously delegated to the states. Until the *Baltimore National Bank* case neither Congress[6] nor those charged with administering the affairs of the Reconstruction Finance Corporation[7] had understood Revised Statutes, Section 5219, when read in the light of Section 10 of the Reconstruction Finance Corporation Act, to authorize state taxation of the Corporation's holdings of national bank stock. Immediately after the *Baltimore National Bank* decision congressional intention in the matter was clarified by the passage of the Act of March 20, 1936, which not only immunized the Corporation from such taxation in the future but retroactively withdrew the authority held to have been given to the states in the past.

Petitioners, although conceding the validity of the prospective operation of the Act of March 20, 1936, contend that both the Fifth Amendment and

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[6] See H. Rept. No. 1995, 74th Cong., 2d sess., p. 2; S. Rept. No. 1545, 74th Cong., 2d sess.)

[7] See H. Rept. No. 1995, 74th Cong., 2d sess., p 2; Supp. 471 (W. D. Ky.), see also H. Rept. No. 2199, 74th Cong., 2d Sess. From the outset local authorities were apprised of this position (R. 232–233, 255) and several courts accorded validity to the Reconstruction Finance Corporation's contention that the preferred national bank stock which it owned was not taxable. See *In re Opinion of the Justices*, 133 Me. 521; *National Bank of Detroit* v. *Detroit*, 272 Mich. 610; *United States* v. *Lewis*, 10. F. Many states acquiesced in the Reconstruction Finance Corporation's claim in this matter and exempted from taxation its holdings in national bank stock.

the Tenth Amendment to the Constitution prevent Congress from narrowing the scope of the privilege which it had granted to the states by R. S. 5219 after the states have attempted to exercise it. We submit that neither contention can be sustained.

I. The Act of March 20, 1936, Does Not Violate Any Right Guaranteed to Petitioners by the Fifth Amendment

Petitioners contend that the Act of March 20, 1936 does not comply with the requirements of due process of law embodied in the Fifth Amendment. Before discussing the validity of this contention, however, it is necessary to determine whether those requirements measure the scope of permissible congressional action with respect to the delegation to, and withdrawal from, the states of the power to tax federal instrumentalities.[8]

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[8] Petitioners in assessing and attempting to collect the taxes here in question are asserting the authority of the State of Arizona. The character of petitioner counties as political subdivisions of the state [cf. Arizona Code, 1939, Secs. 17-202, 73-204 *et seq.* See also *City of Bisbee* v. *Cochise County*, 52 Ariz. 1, 78 P. (2d) 982; *Hartford Accident, etc., Co.* v. *Wainscott*, 41 Ariz. 439, 445-446, 19 P. (2d) 328], when considered in conjunction with the nature of the taxes here involved [some of the instant taxes are destined directly for the state, the county officer acting merely as a collection agent (R. 233-235, 300, 302-303) in accordance with the provisions of the Arizona statutes (Arizona Code, 1939, Secs. 73-701, 73-702], leaves little doubt that petitioners are properly in the position to assert that authority

We contend that in asserting their present claim, petitioners do not come within the protection of the Fifth Amendment and that in any event, the Act of March 20, 1936, does not conflict with the requirements of due process of law.

A. THE FIFTH AMENDMENT DOES NOT PROTECT THE INTEREST WHICH A STATE HAS IN COLLECTING TAXES WHICH IT HAS ASSESSED ON FEDERAL INSTRUMENTALITIES

The due-process clause of the Fifth Amendment protects any "person" against deprivation of "life," "liberty," or "property" by the Federal Government without "due process of law." The language of the clause alone is of little assistance in determining whether petitioners are within its ambit in asserting their claim. The elusive content of such legal conceptions as "person" and "property" compels resort to the history, and examination of the context, of the due-process clause in resolving the present inquiry. *Parker* v. *Brown*, No. 46, this Term, decided January 4, 1943.

The guarantee thus embodied in the Fifth Amendment traces its origins to the 39th Section

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in this suit. Cf. *Spokane County* v. *United States*, 279 U. S. 80. Accordingly both their position as litigants and the defenses which are open to them in this case are to be measured on the premise that the State of Arizona is the active party.

Cf., e. g., *Georgia* v. *Evans*, 316 U. S. 159; *Ohio* v. *Helvering*, 292 U. S. 360.

of the Charter of King John.[10] In terms, that section alludes to the protection to be accorded to men, rather than to corporate or political entities, from arbitrary actions of the sovereign.[11] The fact that the "men" whom the Charter protected may well have enjoyed many powers akin to those now enjoyed by quasi-sovereign governmental subdivisions, and that protection in the enjoyment of

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[10] See *The Federalist*, No. 84; Story, *Constitution of the United States* (4th ed.), sec. 1789; Taylor, *The Origin and Growth of the American Constitution* (1911), chap. VIII; Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 365; see also *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272; *Matlox* v. *United States*, 156 U. S. 237; *Davidson* v. *New Orleans*, 96 U. S. 97, 101.

[11] In Cooley's *Constitutional Limitations* (8th ed.), Vol. 2, it is stated (p. 733):

> The chapter, as it stood in the original charter of John, was: "Ne corpus liberi hominis capiatur nec imprisonetur nec dissesisietur nec utlagetur nec exuletur, nec aliquo modo destruator, nec rex eat vel mittat super eum vi, nisi per judicium parium suorum, vel per legem terrae." No freeman shall be taken or imprisoned or dissessed or outlawed or banished, or any ways destroyed; nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land. In the charter of Henry III. it was varied slightly, as follows: "Nullus liber homo capiatur vel imprisonetur, aut dissesisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae."

those powers was sought,[12] is of little significance in the present inquiry. The subsequent development in England of the conceptions embodied in this provision discloses a tendency to apply its limitations to the protection of the property and liberty of private citizens in their relations with the sovereign.[13]

On this continent the derivative of the 39th Section, as it appeared in state constitutions contemporaneously with the American Revolution, was clearly addressed to the relationship between the sovereign and private citizens in the exercise of their ordinary civil and property rights.[14] And the

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[12] See e. g., Adams, *Origin of the English Constitution* (1912), 242–244; Radin, *Anglo-American Legal History* (1936), secs. 98, 100, 104, 106; McIlwain, *Due Process of Law in Magna Carta*, 14 Columbia L. Rev. 27.

[13] See, e. g., Coke's *Institutes* (E. Brooke Ed.; London 1797), 45–46, 50–57. In Book IV of Blackstone's *Commentaries* at p. 424 (IV Lewis Ed. (1900) at p. 1786) it is stated with reference to the Magna Charta:

> And lastly (it alone would have merited the title that it bears of the *great* charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by judgment of his peers, or the law of the land.

compare Book I of Blackstone's *Commentaries*, pp. 121–145 (I Lewis Ed. (1900) at pp. 107–133).
See also Adams, *Origin of the English Constitution* (1912), 252–253; Taylor, *The Origin and Growth of the American Constitution* (1911), 75–83.

[14] See e. g., Constitutions of Connecticut, Maryland, North Carolina, Pennsylvania, and Virginia (adopted in 1776), Vermont (adopted in 1779), South Carolina (adopted in 1778), and Massachusetts (adopted in 1780) all quoted in Taylor *supra*, at pages 76–77.

language of a similar provision in the Northwest Ordinance of 1787 leaves no doubt that the civil liberties and property rights of the individual were the exclusive objects of its protection.[15]

While the conditions which led to the creation of the Federal Constitution[16] and the discussions attending its formation[17] suggest that its creators were largely concerned with other problems than the preservation of the liberties of individual citizens, the context in which the Fifth Amendment made its appearance points exclusively to the protection of the private person from arbitrary action by the sovereign. As contemporary discussions,[18] the proceedings in the various state conventions,[19] and Madison's remarks on intro-

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[15] Article II of the Northwest Ordinance, in a provision strikingly like the Fifth Amendment, contained a clause providing that: "* * * No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land * * *."

[16] See e. g., generally Beard and Beard, I *The Rise of American Civilization;* Warren, *The Making of the Constitution* (1937) 3–55.

[17] See generally Farrand, *Records of the Federal Convention of 1787* (1911); Warren, *The Making of the Constitution:* cf. 1 Parrington, *Main Currents of American Thought.*

[18] See e. g., *The Federalist*, No. 84; Letter of Richard Henry Lee to Governor Randolph of Virginia, quoted in Warren, *Congress, the Constitution and the Supreme Court* (1935), 79 n. 2; II Jefferson's works (Ford. Ed.) 329.

[19] See II *Elliot's Debates*, 418–434; II *Elliot's Debates*, 410; I *Elliot's Debates*, 334–337; III *Elliot's Debates*, 317, 442;

ducing the proposed amendments to Congress [20] make clear, one of the pervasive sources of dissatisfaction with the Constitution as submitted to the states for ratification was its failure to include a "Bill of Rights" which would protect the individual citizen against the Federal Government. That there was unquestionably current during the period of ratification a concern for the additional protection of state authority against encroachments by the new national government cannot be denied. But the significant point is that the Fifth Amendment was a portion of what was styled by contemporaries a "Bill of Rights." [21] And that

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446–449, 461, 593–594; and cf. the documents evidencing the ratification of the Constitution by the States of Massachusetts, Virginia, and New Hampshire collected in H. Doc. No. 398, 69th Cong., 1st Sess. (1927) 1027–1034, 1018–1020, and 1024–1026; see 2 Thorpe *Constitutional History of the United States* (1901) ch. II–V.

[20] See 1 Annals of Cong. 433 *et seq.*

[21] See e.g., *The Federalist* Nos. 43–46; Warren: *The Making of the Constitution*, 751 *et seq.*; and cf. the documents evidencing ratification by Virginia, Massachusetts, and New Hampshire, cited *supra*, note 19.

[22] See e. g., 1 Annals of Cong. 436; see Warren, *Congress, the Constitution, and the Supreme Court* (1935) 79–91. In introducing the proposed amendments to the Constitution to the first Congress, Madison treated as a unit what are now the first nine amendments. The other suggested amendments, including what is now the Tenth Amendment, were treated separately both by Madison and by the Congress. See e. g., 1 Annals of Cong. 434; 2 Thorpe, *Constitutional History of the United States* (1901), 200–211, 225–227, 257–258, 259–260

Bill of Rights was in no way addressed [23] nor understood by contemporaries [24] as addressed, to the relationship of the states to the nation. On the contrary it was universally recognized at the time of its adoption that the amendments embodied in it were, as a group, designed for the security of the individual against the Federal Government.[25]

Not only the historical frame of reference in which the Fifth Amendment arose, but the context of the due-process clause in the provisions of that amendment suggests that the individual person, rather than the political entity was the intended object of its protection. The due-process clause is part of a provision which deals with a prohibition against double jeopardy, with a requirement of presentment or indictment for crimes, and with a prohibition against compelling a person to testify against himself, all safeguards for individual persons. Any inference that the states,

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[23] See *supra*, notes 20, 22. The import of the Bill of Rights as a protection for the individual citizen rather than the state in its relationship with the Federal Government is suggested by the fact that Madison in introducing the Bill of Rights to Congress urged the wisdom of including in the Federal Constitution similar protections for the individual against the states, and proposed amendments to that effect. See 1 Annals of Cong. 441.

[24] For example, at no time in the discussion of the propositions embodied in the Bill of Rights was there the slightest allusion to those provisions as measuring rods either for the distribution of powers between nation and states, or for the protection of states in any of their activities. See 1 Annals of Cong. 424–450, 660–779, 71–88.

[25] See notes 20, 22, 23, *supra*.

even in their proprietary activities, were to come within its protection, is thus made difficult, if not negatived, by the context of the clause in the amendment. And the congressional debates, although silent on the due-process clause, indicate clearly that the provisions of the Fifth Amendment were understood in terms of the protection to be accorded the private person.[26]

In the light of this background, it is abundantly clear that the guarantees contained in the Fifth Amendment were not designed for the incidents of the relationship between the states and the Federal Government. Other provisions of the Constitution may affirmatively restrict federal power to curtail state authority,[27] and a more pervasive security for the states in this respect may be found in the fact that the Federal Government is one of delegated powers. But the Fifth Amendment has no relevance to the problem here presented. Whatever may be said of the controverted question whether private corporate rights are within the protection of the due process clause (cf. dissenting opinion in *Conn. General Co. v. Johnson*, 303 U. S. 77), it cannot seriously be thought the Fifth Amendment was designed to affect the distribution of political power between the states and the central government.

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[26] See 1 Annals of Cong. 753.

[27] Cf. Article I, Section 9, clause 5; cf. also Article IV, Section 4.

There can be little doubt that the power here sought to be exercised by Congress is within its constitutionally delegated authority. Complete discretion in immunizing federal instrumentalities from state taxation is vested in Congress by Article I, Section 8. Cf. *Pittman* v. *Home Owners Loan Corp., supra.* Congressional supremacy in this matter leaves no doubt as to the power to withdraw prospectively from the states authority theretofore delegated. Cf. *Williamson* v. *New Jersey,* 130 U. S. 189. And the necessity which is the source of this power to insulate federal instrumentalities from taxation, suggests no rational basis for distinguishing between prospective and retrospective protection for the operation of these agencies. The protection which their activities require is not less because the interference with them is partially consummated rather than wholly anticipated. Certainly in view of the knowledge on which Congress here acted (H. Rept. No. 1995, 74th Cong., 2d Sess., *infra,* Appendix, see also Sen. Rept. No. 1545, 74th Cong., 2d Sess.), retroactive protection is an "appropriate means", "adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it." *Legal Tender Case,* 110 U. S. 421, 440.

It should be noted that the federal authority, here asserted, does not involve any interference with the state's enjoyment of its "property", as

that term is traditionally used," or with the activities of the state in its proprietory capacity, cf. *Wyoming* v. *United States*, 255 U. S. 489, 509; *Wayne County, Kentucky* v. *United States*, 53 C. Cls. 417, affirmed *per curiam*, 252 U. S. 574; and compare *New York* v. *United States*, 257 U. S. 591, 601, or with any contractual relationship between the state and the United States. Cf. *Lynch* v. *United States*, 292 U. S. 571, 579. Although the history of the Fifth Amendment casts doubt on whether, even in those situations, its protection extends to the states, that question is not here involved. Nor is there any need to ascertain whether the powers delegated to Congress by the Constitution fall short of authority to interfere with otherwise legal proprietary in-

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* Thus, it is not even necessary to consider here whether, if the State had fully exercised the delegated power and reduced the fruits of its exercise to enjoyment, Congress could authorize the recovery of the sums collected. Cf. *Spokane County* v. *United States*, *supra*, note 8.

And it should be noted that, viewed against the larger background, the very funds which the State here seeks to tax are gratuities from the Federal Government. The acquisition by the R. F. C. of preferred stock in national banks represents the injection of new capital into the State when existing capital vanished in a great depression and private sources of capital were refusing and were unable to render aid. Not only is the taxable capital of a State unimpaired by the activities of the R. F. C. but, in preventing a vast number of inevitable bank failures, the Corporation made possible the preservation to the States of much taxable capital in the form of common stock, which would otherwise have vanished. See H. Rept. No. 2199, 74th Cong., 2d Sess.

terests of states. Cf. *New York* v. *United States*, 257 U. S. 591, 601. We are here concerned with the narrow question whether the stricture of the Fifth Amendment applies to the withdrawal from a state of a political power (to tax federal instrumentalities), over the disbursal of which Congress has unlimited discretion, after an attempt has been made to exercise it. We submit that it does not. Its context and history indicate that it was not designed to be invoked in such circumstances, and no decision of this Court has ever so applied it.

B. THE ACT OF MARCH 20, 1936, DOES NOT VIOLATE THE REQUIREMENTS OF DUE PROCESS OF LAW

Petitioners do not, and in the light of this Court's previous decisions cannot (e. g., *Pittman* v. *Home Owners' Loan Corp.*, *Federal Land Bank* v. *Bismarck Lumber Co.*, *supra*), question the authority of Congress prospectively to exempt national bank shares owned by the Reconstruction Finance Corporation from state and local taxation. Their complaint is limited to the provision of the Act of March 20, 1936, exempting the Reconstruction Finance Corporation from taxes "heretofore, * * * imposed, levied, or assessed." The 1935 taxes which the counties seek to collect were levied prior to November 2, 1935, and one-half thereof was payable on that date (R. 235). Thus it is clear that insofar as these taxes are concerned the Act of March 20, 1936, is applicable. We submit that, even if the protection

of the Fifth Amendment does extend to the interest of the state in the exercise of governmental power theretofore delegated, the requirements of that amendment are not infringed by the Act of March 20, 1936.

The Federal Constitution, unlike many state constitutions,[29] does not expressly prohibit retroactive legislation. Such limitations on congressional power in this respect as are here relevant[30] proceed from the requirement of the Fifth Amendment that no person shall be deprived of his life, liberty or property without due process of law. The question raised by petitioners, therefore, is whether Congress in seeking retroactively to narrow the scope of the authority which it had inadvertently delegated to the states is acting so unreasonably and capriciously as to violate the requirements of due process of law.

Since, at least with respect to the authority to tax securities held by the Reconstruction Finance Corporation, Congress by Revised Statutes, § 5219,

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[29] See 2 Cooley, *Constitutional Limitations* (8th ed.), p. 733, note 1; Black, *Constitutional Prohibitions* (1887), section 172; Smith, *Retroactive Laws and Vested Rights* (1927), 5 Texas Law Review 231, note 2.

[30] The only other limitation in this respect is contained in Article I, Section 9, cl. 3, which provides that "No Bill of Attainder or ex post facto Law shall be passed". This provision was held in *Calder* v. *Bull*, 3 Dall. 386 (accord *Locke* v. *New Orleans*, 4 Wall. 172; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140) to apply only to criminal laws. Hence it cannot be invoked here.

gratuitously extended a privilege to the states (see *supra*, pp. 15–18), a relatively wide discretion in curtailing Section 5219 at any time may be urged. *Cf. United States* v. *Teller*, 107 U. S. 64, 68; *Frisbie* v. *United States*, 157 U. S. 160, 166; *Cummings* v. *Deutsche Bank*, 300 U. S. 115; *Lynch* v. *United States*, 292 U. S. 571, 577. Indeed the "congenital infirmity" which attaches to many types of contracts with the United States (*Norman* v. *Baltimore & Ohio R. R.*, 294 U. S. 240, 307–308) would seem even more clearly to characterize the bounty which the Government here bestowed upon the states. *Cf. Bridge Company* v. *United States*, 105 U. S. 470; *Salt Company* v. *East Saginaw*, 13 Wall. 373.

And where, as here, it is an overly broad grant of political authority which Congress is seeking to retract, even greater freedom may be urged. *Cf. Western Union Telegraph Co.* v. *Louisville & Nashville Railroad Co.*, 258 U. S. 13, 19–20. In disbursing and withdrawing authority to tax federal instrumentalities, Congress is not to be held to the standards which govern the reasonableness of legislation altering the relationships between private citizens in their dealings with each other (*cf., e. g., Ochoa* v. *Hernandez*, 230 U. S. 139) or between private citizens and the sovereign. (Cf. e. g., *Ettor* v. *City of Tacoma*, 228 U. S. 148.) *Cf. Williamson* v. *New Jersey*, 130 U. S. 189; and compare *City of Bisbee* v. *Cochise*

County, supra, note 8. The extent of immunity from state and local taxes to be given a federal agency directly involves a delicate adjustment of federal-state governmental relations in a field where the power of the Federal Government is concededly dominant. The very real concern of the Federal Government for state and local revenue evidenced not only by consent to taxation in many situations [31] but as well by grants-in-aid to the states [32] is a factor that argues for minimizing tax immunity. On the other hand the economical and proper functioning of federal agencies in many situations may require extensive immunity from state taxation. Therefore, to determine the appropriate scope of immunity, the impact on federal-state relations and the facts respecting the financial policies of the particular federal agency are among the factors that must be carefully considered. The wisdom of according unusual

[31] For example: real estate of Federal Reserve Banks is subject to state and local taxation. Act of December 23, 1913, c. 6, 38 Stat. 258, Sec. 7, as amended, U. S. C., Title 12, Sec. 531. Likewise, the real property acquired by the Home Owners' Loan Corporation is subject to state taxation. Act of June 27, 1934, c. 847, 48 Stat. 1252, Sec. 208, as amended, U. S. C., Title 12, Sec. 1714. Indeed the real property of the R. F. C. itself is made subject to state taxation by the very section of the statute which immunizes other R. F. C. activities, see *supra*, p. 3.

[32] For example, Highway Act, Act of November 9, 1921, c. 119, 42 Stat. 213, Sec. 6, as amended, U. S. C., Title 23, Sec. 6; Social Security Act, c. 531, 49 Stat. 620, Sec. 1, U. S. C., Title 42, Sec. 301.

weight to congressional determination of such purely governmental matters is self-evident. *Cf. Coleman* v. *Miller*, 307 U. S. 433, 454, *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 104.

Moreover, equities such as "action in reliance" which might be invoked in the circumstances attending other instances of retroactive legislation are not present here. Before these taxes were assessed, local authority to do so was disputed.[33] From the outset the states, and petitioners here, were put on notice as to the contention of the Reconstruction Finance Corporation with respect to the taxability of the stock it held (see *supra*, pp. 9, 18), and many states acceded to the limitations thus asserted on their taxing power. Petitioners are thus in no position to claim "novelty and surprise" (*Swayne & Hoyt, Ltd.*, v. *United States*, 300 U. S. 297) [34] in the attempt of Congress now to reinforce legislatively the claim earlier made by agencies of the Federal Government under colorable authority (H. Rept. No. 1995, 74th Cong., 2d Sess.). On the contrary, it is petitioners who seek to take advantage of an

[33] The 1935 taxes here in question were levied prior to the decision of this Court in *Baltimore Nat. Bank* v. *State Tax Comm'n*, 297 U. S. 209, at a time when the taxability of this stock under the general consent statute was questioned.

[34] Compare *Nichols* v. *Coolidge*, 274 U. S. 531; *Coolidge* v. *Long*, 282 U. S. 582; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98.

unexpected hiatus in the law. Uniformly, until the *Baltimore National Bank* decision, the statutes had been construed by the Reconstruction Finance Corporation, by the courts, and by many states, to insulate the Corporation from state taxation of its holdings of bank stock. The present statute, therefore, enacted less than two months after the *Baltimore Bank* decision, is merely an attempt to "remedy mistakes and defects in the administration of government" which that decision pointed out.

In these circumstances, the retroactive provisions of the Act of March 20, 1936, are not so arbitrary or capricious as to violate the requirements of the Fifth Amendment. Retroactivity does not, itself, render legislation invalid, as innumerable instances of the retroactive application of revenue statutes bear out.[35] While on occasion attempts at retroactivity have been held invalid, in those instances there were present other elements which were thought to render the legislation arbitrary and capricious.[36] In considering legislation of this

[35] See e. g., *Stockdale* v. *Insurance Companies*, 20 Wall. 323; *Patton* v. *Brady*, 184 U. S. 608; *Billings* v. *United States*, 232 U. S. 261; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Milliken* v. *United States*, 283 U. S. 15; and see also *League* v. *Texas*, 184 U. S. 156.

[36] As the cases disclose, the objection to retroactivity stems primarily from the unforeseeable alteration it works in the rights of participants to already completed transactions. See, e. g., *Ochoa* v. *Hernandez*, *supra*; *Nichols* v. *Coolidge*, *supra*. By the statute in this case, however, unlike the legis-

character, as was pointed out in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 429, a distinction must be made "between a bare attempt of the legislature retroactively to create liabilities for transactions * * * fully consummated in the past * * * and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice." By the Act of March 20, 1936, Congress attempted to cure an unforeseen, and arguably an unforeseeable, defect in legislation by retroactively applying a policy which at all times it had authority to invoke and which had been asserted against the petitioners under colorable authority at the time the tax here in question was assessed.[37] Legislation of this character does not exceed the limits of due process of law. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *Charlotte Harbor Railway Co.* v. *Welles*, 260 U. S. 8, 12; *McNair* v. *Knott*, 302 U. S. 369; *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505. Accordingly, the Act of March 20, 1936 is effective to prevent the collection of the taxes sought to be

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lation involved in most of those cases, "the legislature simply was establishing the situation as both parties knew from the beginning it ought to be." *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U. S. 338, 340.

[37] See S. Rept. No. 1545, 74th Cong., 2d Sess.; H. Rept. No. 2199, 74th Cong., 2d Sess.

levied against the Reconstruction Finance Corporation for 1935 and 1936.[28]

II. The Act of March 20, 1936, Does Not Deprive Petitioners of Any Rights Guaranteed to Them by the Tenth Amendment

Petitioners also urge that Congress, in seeking to prohibit the collection of taxes which were validly assessed, invades the powers reserved to the states by the Tenth Amendment to the Constitution. While they concede the propriety of any prospective withdrawal by Congress of delegated authority to tax instrumentalities of the United States, they contend that any retroactive destruc-

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[28] In any event it should be noted that with respect to the 1936 taxes the Act need not be applied retrospectively, for those taxes were levied after March 20, 1936 (R. 296–299, 300, 302–303, 325). The Counties rely on *United States* v. *Alabama*, 313 U. S. 274, for the proposition that the Act must be applied retrospectively with respect to the 1936 taxes because the statutory lien attaches as of the first Monday in January. Arizona Code, 1939, Sec. 73–506, set out above. The question in that case, however, was simply whether a tax lien attaching to property before purchase by the United States was divested by reason of the implied immunity of the property of the United States from state taxation. Here Congress has expressly withdrawn the property in question from taxation. Until the tax was levied, the lien was merely an inchoate one (*New York* v. *Maclay*, 288 U. S. 290), as this Court recognized in *United States* v. *Alabama*, *supra*. To relieve against a tax not yet levied cannot be regarded as retroactive legislation simply because an ancillary collection device exists prior to levy of the tax.

The validity of the prospective feature of the Act of March 20, 1936, is plainly separable from the retrospective

tion of the power thus granted impinges upon their constitutionally reserved authority.

As we have pointed out above, petitioners are properly in a position to claim whatever rights the state may claim under the Tenth Amendment.[39] (See *supra*, note 8.) But the tautology implicit in the Tenth Amendment—"that all is retained which has not been surrendered" (*United States* v. *Darby*, 312 U. S. 100, 124; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325; *Gordon* v. *United States*, 117 U. S. 697, 705; *United States* v. *The William*, 28 Fed. Cas. No. 16,700 (D. Mass.))—reduces the inquiry on this phase of the case to the question whether the Constitution otherwise authorized Congress to enact the Act of March 20, 1936. If it did, petitioners' defense under the

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feature. The Act itself contains a separability clause providing that (Sec. 3):

> If any provision, word, or phrase of this Act, or the application thereof to any condition or circumstance, is held invalid, the remainder of the Act, and the application of this Act to other conditions or circumstances, shall not be affected thereby. (U. S. C., Title 12, Sec. 51f.)

The spirit of the enactment requires recognition of its prospective validity apart from its retrospective features.

[39] The subject matter of the Tenth Amendment is the distribution of governmental powers between state and nation. Accordingly, even more clearly than with respect to the Fifth Amendment, the contentions of petitioners with respect to the Tenth Amendment must be understood as addressed not to any congressional extraction from the state of property which the latter owned, but to some alleged curtailment of governmental powers which the Constitution vested in the state.

Tenth Amendment must fall. We submit that it did.

By virtue of Article I, section 8, of the Constitution, Congress has the exclusive authority to determine whether and to what extent the Reconstruction Finance Corporation shall be immune from state taxation. See *Smith* v. *Kansas City Title and Trust Co.*, 255 U. S. 180; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95; *Pittman* v. *Home Owners Loan Corp.* 308 U. S. 21, 33. Accordingly, the authority under which the tax here in question was levied was not a power mechanically reserved to the states under the Tenth Amendment. Indeed, as the decision in *Baltimore Nat. Bank* v. *State Tax Comm'n, supra,* makes clear, the privilege to tax the R. F. C.'s holdings which the State possessed was conferred upon it by Congress. At best, therefore, unless Congress is impotent to withdraw that privilege, the Tenth Amendment affords no defense here.* As we have pointed out above, the power of Congress to protect the operations of Federal instrumen-

* Although the point must of necessity be academic, it should be noted that even if Congress were here impotent to withdraw the delegated authority, there would be a serious question whether the Tenth Amendment could be urged as an additional obstacle in this case in view of the fact that under the Constitution Congress alone is vested with the authority to prohibit state taxation of federal instrumentalities; i. e., since the power to tax the R. F. C.'s holdings was conferred upon the State by Congress, it is not a power *constitutionally* reserved to the State.

talities includes the authority to prohibit state taxation retroactively. See *supra*, pp. 26–27. The only other asserted ground of congressional impotence here is the Fifth Amendment. We have demonstrated, however, that that ground cannot be sustained.

Since Congress was thus authorized by Article I, Section 8, to pass the Act of March 20, 1936, and is not otherwise prohibited therefrom by the Constitution, none of the powers reserved to the states have been invaded.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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JANUARY 1943.

APPENDIX

H. Rept. No. 1995, 74th Cong., 2d Sess., pp. 1–2:

The Reconstruction Finance Corporation was created by act of Congress on January 22, 1932, and was designed to give relief to financial and kindred institutions in a national emergency, in accordance with policies announced by Congress. In aid of its purposes, section 10 of the Reconstruction Finance Corporation Act provided that "the Corporation, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation", State or Federal. Section 10 has generally been understood to assert the broadest possible immunity from the burden of taxation for the Corporation, its assets and its operations. This construction follows from the language of the section which confers tax exemption upon "the Corporation", while specifically consenting to the taxation of real property alone. This construction follows also from the material impairment of the Corporation's operation and effectiveness by any burden of State and Federal taxation, for in furtherance of its purposes the corporation has kept its charges at the lowest rates consistent with sound financing.

By act of March 9, 1933, the Corporation was authorized to subscribe to the preferred stock, capital notes, and debentures of national banks and State banks and trust companies. No specific tax exemption was enacted at that time since it was

assumed that section 10 of the Reconstruction Finance Corporation Act was sufficient. This was the belief also of the many States that have never sought to tax the shares, notes, and debentures, and is specifically demonstrated by the opinions of the supreme courts of Maine and Michigan, and by the opinions of the attorneys general of many of the States. Moreover, some States which tax generally shares of bank stock have expressly exempted preferred shares, no matter by whom owned.

Consistent with the Corporation's policies and with the general purposes of congressional mandates governing its action, it has sought to make available capital funds at the lowest appropriate rates, which are 3½ percent until February 1, 1940, and 4 percent thereafter. The initial rate was 6 percent. Since the Corporation pays the Treasury 2¾ percent for the funds procured from it, the present rate is as low as is consistent with sound financing, leaving a very small margin to cover operating expenses and individual losses.

However, the United States Supreme Court, in an opinion handed down on February 3, 1936, in the case of the *Baltimore National Bank* v. *State Tax Commission of Maryland*, has held that the shares of preferred stock of national banks owned by the Corporation are subject to State taxation. The general consent, contained in Revised Statutes, section 5219, to the taxation of the capital stock of national banks, was held to prevail, notwithstanding the broad provisions of section 10 of the Reconstruction Finance Corporation Act.

This privilege to tax has certain unfortunate consequences when applied to activi-

ties of the Reconstruction Finance Corporation. Taxation of the preferred shares, notes, or debentures of banks held by the Reconstruction Finance Corporation will not only encroach in all cases upon the small margin between the cost to the Reconstruction Finance Corporation of its money and the return on its investments in banks, but in many cases it will wipe this margin out entirely, impeding the Corporation's operations and leaving it perhaps with an actual substantial loss. Moreover, some States do not impose any tax on stock, notes, or debentures of this nature; while the rates in others vary from a small fraction of 1 percent to a percentage which practically exhausts the entire return, bringing an inequality into the relationship of the Reconstruction Finance Corporation and the banks to which it is rendering assistance.

Although the opinion of the Supreme Court refers only to the preferred stock of national banks, it is deemed wise to extend the provisions of the proposed bill to cover Reconstruction Finance Corporation investments in State banks as well, so that there may be no question as to the intent of Congress.

The committee feels that when Congress enacted section 10 of the Reconstruction Finance Corporation Act, it was intended to give as wide immunity as possible to the functions and activities of the Corporation and the enactment of the proposed bill will accomplish that intention.

Similar statements are found in H. Rep. No. 2199, 74th Cong., 2d Sess.; and in S. Rep. No. 1545, 74th Cong., 2d Sess.

U. S. GOVERNMENT PRINTING OFFICE 1943

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SUPREME COURT OF THE UNITED STATES.

No. 449.—October Term, 1942.

Maricopa County, Arizona, W. H. Linville, as County Treasurer, and Ex-Officio Tax Collector of Maricopa County, et al., Petitioners,
vs.
The Valley National Bank of Phoenix.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 1, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners are counties of the state of Arizona and certain county officers. Respondent is a national banking association incorporated under the laws of the United States and having its principal banking house at Phoenix, Maricopa County, Arizona. It sued petitioners[1] to restrain the collection of certain state, county, school district and municipal taxes for the years 1935 and 1936 and invoked the jurisdiction of the United States District Court for the District of Arizona under § 24(1)(a) of the Judicial Code, 28 U. S. C. § 41(1)(a).

Respondent has two classes of shares of capital stock outstanding—common and preferred. Prior to March 9, 1933, national banks were not authorized to issue preferred shares. On that day they were given such authority and the Reconstruction Finance Corporation was authorized to subscribe for such shares. Act of March 9, 1933, 48 Stat. 1, Title III, as amended by § 2 of the Act of March 24, 1933, 48 Stat. 20, 12 U. S. C. § 51a, § 51d. On February 11, 1935, respondent issued to the Reconstruction Finance Corporation some 198,400 shares of its preferred stock with a par value of $1,240,000. By § 5219 of the Revised Statutes, 12 U. S. C. § 548, Congress consented on certain conditions to state taxation of shares of stock of national banking associations. Arizona taxes shares of stock of banking corporations. The tax is paid in the first instance by the bank which is entitled to reimbursement from the shareholder on whom the tax liability ultimately rests. Ariz.

[1] For an earlier phase of this litigation see Ex parte Bransford, 310 U. S. 354.

Code (1939) § 73-204, § 73-205. The Arizona statutes also provide that a lien for all taxes levied shall attach as of the first Monday in January of each year on the property assessed. § 73-506. Assessments of personal property are made by the county assessor between the first Monday in January and the first day in May of each year. § 73-402. State and local taxes levied on the basis of this assessment are collected by the county treasurer as *ex officio* tax collector. § 73-605, § 73-702. Petitioners' assessments for 1935 included respondent's preferred shares owned and held by the Reconstruction Finance Corporation. On the basis of those assessments, taxes were levied in 1935 against respondent which thereupon filed its bill of complaint in the federal District Court. While the cause was pending this Court decided *Baltimore Nat. Bank* v. *State Tax Comm.*, 297 U. S. 209, which held that preferred shares of a national bank held by the Reconstruction Finance Corporation were subject to state taxation by reason of the consent given by Congress in § 5219 of the Revised Statutes. That decision was rendered on February 3, 1936. On March 20, 1936, Congress enacted a statute providing that shares of preferred stock of national banks "heretofore or hereafter acquired by" the Reconstruction Finance Corporation "shall not, so long as Reconstruction Finance Corporation shall continue to own the same, be subject to any taxation by the United States, by any Territory, dependency, or possession thereof, or the District of Columbia, or by any State, county, municipality, or local taxing authority, whether now, heretofore, or hereafter imposed, levied, or assessed, and whether for a past, present, or future taxing period." 49 Stat. 1185, 12 U. S. C. § 51d. On the authority of that Act, the District Court, after finding that respondent's remedy at law was inadequate, issued a permanent injunction against the collection by petitioners of that portion of the 1935 taxes levied on respondent's preferred stock owned by the Reconstruction Finance Corporation. A permanent injunction was also issued in a like cause of action based on taxes for the year 1936 which were levied after March 20, 1936. The judgments in the two suits were affirmed by the Circuit Court of Appeals. 120 F. 2d 356. The case is here on a petition for writ of certiorari which we granted because of the public importance of the questions raised. Pursuant to the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. § 401, the case was certified to the Attorney General as involving the

constitutionality of the Act of March 20, 1936. In response to that certification the United States submitted a brief as *amicus curiae*.

Petitioners contend that the Act of March 20, 1936, violates the Fifth and the Tenth Amendments. They further argue that the word "person" as used in the Fifth Amendment includes counties and states; and that they may raise the Tenth Amendment issue since they are asserting the authority of the State of Arizona in assessing and in attempting to collect the taxes in question. We need not decide the last two questions. For even if we assume, *arguendo*, that petitioners are right in those contentions, we are of the view that the judgment below must be affirmed.

Little need be said in answer to the argument that the Act violates the Tenth Amendment. The authority by which the taxes in question were levied did not stem from the powers "reserved to the States" under the Tenth Amendment. It was conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 211-213; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21, 33; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95. Hence when Congress withdrew the privilege which it had previously granted, it was not curtailing any political power which the Constitution had reserved to Arizona. See *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664; *Des Moines Nat. Bank* v. *Fairweather*, 263 U. S. 103, 106, and cases cited.

The argument that the Act of March 20, 1936, violates the Fifth Amendment is based on its retrospective feature. Petitioners contend that since the liens of the taxes were impressed before the effective date of the Act, they were property rights which Congress could not destroy. We need not consider the case where prior to the withdrawal of the privilege the tax had been collected or the tax lien foreclosed and the property reduced to the possession of the taxing authority. In the instant case the state taxing authorities are asserting rights which if recognized can be enforced by the maintenance of a suit to establish and foreclose a lien on property of a federal instrumentality, the Reconstruction Finance Corporation. Cf. *New York* v. *Maclay*, 288 U. S. 290. But even a "proceeding against property in which the United

States has an interest is a suit against the United States." *United States* v. *Alabama*, 313 U. S. 274, 282. No such suit may be maintained without the consent of the United States. Such consent, though previously granted, has now been withdrawn. And the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations. *Lynch* v. *United States*, 292 U. S. 571, 581-582, and cases cited. Nor did the prior grant of the privilege to tax the shares rise to a higher level than a gratuity or bounty. Nothing was given in exchange. Cf. *Christ Church* v. *Philadelphia Co.*, 24 How. 300, 302. When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will. Cf. *Dodge* v. *Board of Education*, 302 U. S. 74. Hence, as in the case of the recall of other gratuities (*Frisbie* v. *United States*, 157 U. S. 160, 166; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 122-124), the withdrawal of this privilege invaded no rights protected by the Fifth Amendment.

Affirmed.

Mr. Justice RUTLEDGE did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.